89-167

No.____

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

INSURANCE CORPORATION OF AMERICA,
Petitioner,

v.

J.S. DARST, INSURANCE COMMISSIONER, STATE OF WEST VIRGINIA; STATE OF FLORIDA, WILLIAM GUNTER, COMMISSIONER, DEPARTMENT OF INSURANCE AND TREASURER; STATE OF CONNECTICUT AND PETER W. GILLIES, INSURANCE COMMISSIONER; ROBERT D. HAASE, COMMISSIONER OF INSURANCE, STATE OF WISCONSIN; AND WILLIAM D. HAGER, COMMISSIONER OF INSURANCE, STATE OF IOWA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the lower courts failed to correctly assign the burden of proof on the issue of the authenticity of properly certified court orders when those courts required the party seeking enforcement to prove by a preponderance of extrinsic evidence that the orders were genuine, prior to the introduction of even a scintilla of evidence to the contrary by the parties opposing enforcement.

2. Whether the failure of the lower courts to properly assign the burden of proof on the issue of the authenticity of certified court orders undermines the finality and integrity of court orders generally, and creates uncertainty and unnecessary delay in their enforcement when, under the lower court's rulings, opponents of such orders may place their authenticity at issue and even defeat enforcement without coming forward with evidence.

3. Whether Insurance Corporation of America (the "Petitioner") was improperly deprived of a substantial property right and denied due process when the District Court, as affirmed by the Court of Appeals, failed to properly assign the burden of proof, or to clarify prior to or during trial which party carried that burden.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were Petitioner Insurance Corporation of America and respondents (collectively the "Respondents") the State of Florida, William Gunter, Commissioner, Department of Insurance and Treasurer; State of Connecticut and Peter F. Kelly, Insurance Commissioner; Robert D. Haase, Commissioner of Insurance, State of Wisconsin; and William D. Hagen, Commissioner of Insurance, State of Iowa.

In addition, the following parties did not enter appearances but were listed as plaintiffs in the underlying proceedings because of their position as plaintiffs in the original proceedings giving rise to the orders that are the subject of this dispute: Pocahontas Insurance & Trust Co.; Pocahontas Insurance Co.; Firstcorp Insurance Group. Similarly, respondent J. S. Darst has not entered an appearance, and was listed as a defendant in the underlying proceedings solely because he was named as the primary defendant in the proceedings from which the orders in dispute originated. The parent corporation of Insurance Corporation of America is Principle Holding Corporation, a Delaware corporation.

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IN THE

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INSURANCE CORPORATION OF AMERICA,
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STATE OF WEST VIRGINIA, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unpublished, and is annexed hereto as Appendix A.

The opinion of the United States District Court for the District of Delaware (Robinson, Magistrate, sitting by stipulation of the parties) is unpublished and is annexed hereto as Appendix B.

JURISDICTION

The Petitioner seeks by the instant proceeding enforcement of two orders, issued in 1911 and 1914 respectively, (collectively the "Orders"), by the United States Circuit Court of Delaware, the predecessor court of the United States District Court for the District of Delaware. The Respondents are certain states and insurance commissioners against which enforcement of the Orders is sought.

On November 16, 1988, the Delaware District Court entered a decision and order refusing enforcement of the Orders and dismissing the instant proceedings for lack of subject matter jurisdiction.

On May 5, 1989, the United States Court of Appeals for the Third Circuit entered a decision and order affirming the order of the Delaware District Court. No petition for rehearing was filed. A motion to stay the mandate of the Court of Appeals was filed on May 22, 1989, and granted on June 5, 1989.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rule 17.1, such jurisdiction is appropriate because:

> 1. The Third Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision;
>
> 2. The lower court has decided an important question of federal law that should be settled by this Court; and
>
> 3. The lower court has rendered a decision in conflict with decisions of other federal courts of appeals and the United States Supreme Court on the same matter.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U. S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Evid. 902(4):

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> * * *
>
> (4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

STATEMENT OF THE CASE

A. Procedural History.

The instant proceedings were instituted by the Petitioner on July 28, 1987. On that date, Petitioner filed a Verified Motion for Entry of an Order to Show Cause and for an Injunction (the "Motion to Show Cause"), requesting enforcement of one of the two Orders. Docket No. 1.[1]

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1. The following abbreviations will be used throughout this petition: Delaware District Court Case Record Docket Entry No. =

(footnote cont'd)

As set forth in its Motion to Show Cause, Petitioner sought, and still seeks, enforcement of "a prior judgment of [the Delaware District Court] formerly known as the Circuit Court of Delaware, in that certain action entitled *Pochahontas Insurance & Trust Co., and Pochahontas Insurance Co., and Insurance Corporation of America and Firstcorp Insurance Group v. J. D. [sic] Darst, Insurance Commissioner State of West Virginia, et al.,* entered on February 5, 1914. . . ." (hereinafter referred to individually as the "1914 Order" and annexed hereto as Appendix C). Docket No. 1.

The 1914 Order provides, in pertinent part:

> Therefore, it is Ordered that the four Plaintiffs and each one's seventy-one divisions shall be free from any regulations by any Local, State (Insurance Department and/or Commissioner or by the State Administrator's Office) or by Federal regulations whatsoever.

App. C-2.

Accordingly, in its Motion to Show Cause, Petitioner seeks an order restraining and enjoining the Respondents from denying full faith and credit to the 1914 Order, or from taking actions inconsistent with that Order. The Motion to Show Cause further asks that the Delaware District Court issue an order directing the Respondents to appear and show cause why they should not be held in contempt for certain actions taken that were inconsistent with the 1914 Order. *See* Docket No. 1.

In response to the Motion to Show Cause, Respondents filed motions to dismiss. Docket Nos. 4, 13, 14.

NOTES *(Continued)*

"Docket No. ____"; Appendix at page ____ = "App. at ____." General appendix references are to the appendix filed by the Petitioner in the Court of Appeals. References to the appendices to this petition are cited by appendix letter and page number, *e.g.;* "App. A-1."

Each of the motions to dismiss challenged the authenticity of the 1914 Order. In part on that basis, Respondents asserted that the Delaware District Court lacked subject matter jurisdiction to enforce the 1914 Order.

On or about December 1, 1987, Petitioner filed its Amended Motion for Entry of an Order to Show Cause and for an Injunction. (the "Amended Motion to Show Cause"). Docket No. 44.[2] By its Amended Motion to Show Cause, Petitioner seeks, in addition to enforcement of the 1914 Order, enforcement of a second order of the Circuit Court of Delaware, dated December 8, 1911 (hereinafter referred to individually as the "1911 Order", and annexed hereto as Appendix D). Again, Respondents challenged the authenticity of the 1911 Order and sought summary judgment in the Delaware District Court action. Docket No. 67.

On February 8, 1988, the Honorable Murray M. Schwartz, Chief Judge of the Delaware District Court issued an order setting forth a schedule for discovery in connection with the Amended Motion to Show Cause. Docket No. 48. Among other things, that order stayed all discovery except discovery relating to what the Delaware District Court termed the "core issue" in the case. The order described the "core issue" as "the authenticity and facial validity of the orders sought to be enforced herein." *Insurance Corp. of America v. J. S. Darst,* No. 87-406-MMS (D. Del. Feb. 8, 1988). Docket No. 48.

By stipulation and order dated June 28, 1988, the "core issue" was submitted to the Honorable Sue L. Robinson, United States Magistrate for the District of Delaware for decision. Docket No. 83. On or about June

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2. Petitioner invoked the jurisdiction of the Delaware District Court pursuant to 28 U.S.C. § 2283, to enforce two prior judgments of that court and to protect or effectuate its two Orders. In addition, Petitioner invoked the jurisdiction of the Delaware District Court pursuant to 18 U.S.C. § 401, and requested that the court enforce the Orders through its contempt power.

1, 1988, Magistrate Robinson issued an order establishing dates for trial on "the core issue of the authenticity of the 1911 and 1914 court orders. . . ." *Insurance Corp. of America v. J. S. Darst,* No. 87-406-MMS (D. Del. June 1, 1988). Trial on the issue of authenticity was held and completed on July 27, 1988.

B. The Orders in Dispute.

The Orders as offered at trial were both certified — each on a separate occasion and by a different clerk — by clerks of the United States District Court for the District of Columbia. The Orders were retrieved by the clerks from a court file in the custody and control of the District Court for the District of Columbia, and were stamped, signed and certified as true and correct copies of documents appearing in the records of that district court. App. at 130-140; 147-149. One of the court clerks involved in the certification process specifically remembers retrieving the original of one of the Orders from a court file, from which she made the photocopies that were certified. App. at 139.[3]

The Orders themselves are handwritten, bear no docket numbers, and bear the conformed signature of "Ben Green", who the Orders indicate was a "substitute judge." The Orders further indicate that hearings in the underlying case were held at Dover, Delaware, rather than at the location designated by law as the headquarters of the Federal Court in Delaware — Wilmington, Delaware. Additionally, the Orders appear to have been issued from the United States Circuit Court of Delaware when, at least in connection with the 1914 Order, the

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3. The clerks of the District Court for the District of Columbia have subsequently been unable to locate the original Orders, or the file in the underlying case in which the Orders were issued.

Circuit Court had been merged into the Delaware District Court, but with the Circuit Court's docket continuing until the completion of cases pending before the Circuit Court. *See* App. C, D; App. at 180-181.

At trial, Petitioner offered the original certified copies of the Orders, together with the depositions of the court clerks who certified them. In addition, Petitioner tendered the testimony of Professor Erwin C. Surrency, a legal historian, who testified that the Orders are authentic. App. at 225-226. Professor Surrency clarified at trial that the practice of designating a "substitute judge" was not unusual for the period. App. at 183-186; 333. Indeed, Delaware law at the time provided for the appointment of judges *ad litem,* when necessary. *Id; see* Del. Const. of 1897, art IV § 15. Moreover, Professor Surrency testified that handwritten orders were not uncommon during the 1910-1914 period. App. at 182-183.

Further, as described to the court below, courts of the relevant period often sat at locations other than the headquarters designated for the court, for a variety of reasons. App. at 181-182; 334-336. In the instant matter, the location from which the Orders were issued — Dover, Delaware — previously had been a headquarters for the federal courts in Delaware. App. at 335. The courthouse in which the Orders indicate the underlying hearings were held is among the oldest courthouses in Delaware and is still in use today. *Id.*

In view of the foregoing, and after study of additional subject matter, including the text of the Orders themselves, Professor Surrency testified that in his opinion the Orders are authentic. App. at 225-226. Respondents offered no testimony that directly rebutted Professor Surrency's opinions. Rather, Respondents offered factual testimony at trial tending only to prove that the Orders themselves are the only record that Respondents can find of the case or the Orders at issue, and that

the Orders are not characteristic of contemporary documents filed in the issuing court. App. B-11.

C. Petitioner's Attempt to Introduce the Orders and the Assignment of the Burden of Proof.

At trial before Magistrate Robinson, Petitioner offered certified copies of the Orders for admission into evidence as self-authenticating documents pursuant to Fed. R. Evid. 902(4). App. at 118-128. Despite the fact that the Orders were certified by court clerks as true and correct copies of originals on file with the United States District Court for the District of Columbia, Magistrate Robinson refused during trial to admit the Orders pursuant to Rule 902(4). *See id.*

The Magistrate's failure to admit the Orders during trial created significant confusion with regard to the assignment of the burden of proof. *See id.;* App. at 306. Petitioner advanced the argument then, as it does now, that admission of the Orders as self-authenticating documents pursuant to Rule 902(4) constitutes *prima facie* evidence of authenticity, shifting the burden to the Respondents to show that the Orders are not authentic, or that certification has been obtained by fraud or error. App. at 118-128.[4]

Instead, the Magistrate refused to admit the Orders during trial, required Petitioner to come forward in the first instance with other evidence of authenticity and then permitted Respondents to simply rebut that evidence. App. at 118-322. Much of Petitioner's subsequent rebuttal evidence was then excluded by the Magistrate

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4. Petitioner advanced this argument in its pre-trial brief and repeatedly during trial. *See* Docket No. 97; App. at 76-86. Despite Petitioner's efforts to obtain a ruling, the Magistrate failed until after trial to issue a ruling assigning the burden of proof. *See infra*, pp. 9-11; 19-20.

as improper rebuttal evidence — evidence more properly introduced in Petitioner's case in chief. *See, e.g.,* App. at 318-322.

Had the Magistrate properly ruled on the issue of the burden of proof, Petitioner's *prima facie* burden to show authenticity would have been met in its case in chief by simple introduction of the self-authenticating Orders. The burden should then have shifted to Respondents to come forward with affirmative evidence to show that the Orders are not authentic, or that the certifications were obtained by fraud or error. Petitioner then should properly have been permitted the opportunity to rebut that evidence.

THE DECISIONS AND ORDERS OF THE COURTS BELOW

A. The Delaware District Court.

Magistrate Robinson issued her decision and order on November 16, 1988 dismissing the instant matter for lack of subject matter jurisdiction. In her decision, the Magistrate reviewed Fed. R. Evid. 901 and 902, and, notwithstanding the events that occurred at trial, found that the Orders were admitted at trial "[i]n light of the language and intent of Fed. R. Evid. 901 and 902. . . ." App. B-14. Later in her opinion, however, Magistrate Robinson stated that "[t]he Orders at issue have been admitted pursuant to Fed. R. Evid. 902". App. B-18. Despite that statement, the Magistrate then rejected what she termed "plaintiff's attempts to use the certification as a boot-strap to prove authenticity. . .", noting that the certification process had been "questioned" by Respondents. *Id.*[5]

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5. It should be noted, however, that the Magistrate stated in another portion of her opinion that "[b]y the deposition testimony of deputy clerks Karen M. Keys and Alan Rambow, and that of clerk James F. Davey, it is apparent that the certifications are facially

(footnote cont'd)

In a footnote in which she overlooks cases cited by the Petitioner, the Magistrate then dismissed as unsupported by authority Petitioner's position that admission of the Orders pursuant to Fed. R. Evid. 902(4) raises a presumption of authenticity, shifting the burden to the Respondents to rebut that presumption. App. B-15.[6] The Magistrate reviewed in her opinion the testimony of the court clerks involved in the certification process, together with the opinion testimony proffered by Professor Surrency and the additional factual evidence introduced by Respondents at trial. With regard to the testimony of the court clerks, the Magistrate found the testimony of the two clerks actually involved in the certification process, "less credible" than that of the chief clerk, who had no part in actually certifying the Orders. App. B-19.

The Magistrate further disregarded Professor Surrency's opinion, preferring instead to rely upon the "absence of any documentary evidence (save for the certified copies of the Orders themselves) corroborating the existence of the case or Orders at issue. . . ." *Id.* Without "independent proof that the case was bona fide. . ." the court found Professor Surrency's testimony that the Orders are authentic of "little probative weight." *Id.*

Accordingly, the Magistrate held that Petitioner had failed to meet its burden "to prove by a preponderance of

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NOTES *(Continued)*

valid at least; *i.e.*, the deputy clerks had the general authority to certify copies within the custody of the court and their signatures, along with the court's seal, are fixed to the certified copies". App. B-14.

6. In that same footnote, Magistrate Robinson inaccurately charges Petitioners with having accepted the burden of proving authenticity "by clear and convincing evidence. . . ." App. B-15. As shown in the court below, the Magistrate took out of context Petitioner's statement. *See, e.g.*, App. at 76-86; 337-362. In fact, Petitioner argued at length that Respondents bore the burden of rebutting a presumption of authenticity with evidence that is clear and convincing. *See, e.g.*, App. at 76-86; 337-362.

evidence that the 1911 and 1914 Orders are more likely authentic than not." App. B-20. As a result, the court dismissed the case for lack of subject matter jurisdiction. *Id.*

B. Court of Appeals.

The Court of Appeals affirmed the judgment of the Magistrate. In so doing, the court simply noted, without further comment, that "any ruling as to Fed. R. Evid. 901 and 902, even if possibly erroneous, were [sic] not prejudicial because the documents were admitted for the purpose of determining their genuineness and authenticity." App. A-3. The court totally ignored the fact, however, that improper assignment of the burden of proof materially disadvantaged the Petitioner in that the Petitioner was left in the dark on the question of the nature and extent of its evidentiary responsibilities until after trial.

REASONS FOR GRANTING THE WRIT

I. THE FAILURE OF THE LOWER COURTS TO PROPERLY ASSIGN THE BURDEN OF PROOF UNDERMINES THE INTEGRITY OF COURT ORDERS GENERALLY AND CREATES UNCERTAINTY AND DELAY IN THEIR ENFORCEMENT BECAUSE OPPONENTS OF SUCH ORDERS MAY PLACE THEIR AUTHENTICITY AT ISSUE AND DEFEAT ENFORCEMENT WITHOUT COMING FORWARD WITH EVIDENCE.

Magistrate Robinson and, by implication, the Court of Appeals, have decided an important question of federal law which has not been, but should be, settled by this Court. By refusing to recognize a rebuttable presumption of authenticity for certified court orders, the lower courts in this case have raised a conflict with

related decisions of this Court and the lower federal courts which this Court should settle. Sup. Ct. R. 17.1(a), (c).

Moreover, by obligating parties who seek enforcement of certified court orders to first prove by a preponderance of extrinsic evidence that such orders are authentic, even before the introduction of a scintilla of evidence to the contrary, the lower courts in this matter have established a precedent that will lead to chaos, uncertainty and unnecessary delay in the enforcement of court orders. The rulings of the lower courts in this matter allow a free for all where prompt enforcement of court orders can be thwarted prior to — and in some cases without — the production of even a shred of evidence by opponents of the orders. The lower courts have sanctioned a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

A. Opponents of Enforcement of Prior Certified Orders of the Court Must Bear the Burden of Establishing That Such Orders Are Not Authentic.

In establishing the Federal Rules of Evidence, Congress, and the Supreme Court, recognized that certain documents are entitled to "special" treatment, in view of traditional guarantees of trustworthiness and authenticity. *See, e.g.,* Fed. R. Evid. 803(5), (6), (8), (9); 902. Indeed, it has long been recognized that documents — particularly court records — produced by a public officer whose duty it is to keep such documents, should, without more, be received in evidence. *United States v. Percheman,* 32 U.S. 51 (1833); *Turnbull v. Payson,* 95 U.S. 418 (1877) (recognizing that court records may be proved by the clerk's certificate alone, without an additional judge's certificate). This almost without exception has been the case where such documents have been

properly certified. *See, e.g., New York Drydock v. Hicks,* 18 F. Cas. 151 (Cir. Ct. Mich. 1850); *United States v. Wingard,* 522 F.2d 796 (4th Cir. 1975), *cert denied,* 423 U.S. 1058 (1976) (citing Fed. R. Evid. 902 and noting that for cases tried on or after July 1, 1975, a certified document is admissible in evidence without extrinsic evidence of its authenticity).

Accordingly, courts considering the trustworthiness of public records have generally placed the burden of proving lack of reliability upon the party opposing introduction of the records. *See, e.g., Ellis v. International Playtex, Inc.,* 745 F.2d 292, 301-02 (4th Cir. 1984) (citing *Baker v. Elcona Homes Corp.,* 588 F.2d 551, 558 (6th Cir. 1978), *cert. denied,* 441 U.S. 933 (1979)) (construing Fed. R. Evid. 803(8)); *Wilk v. American Medical Ass'n,* 671 F. Supp. 1465, 1472 (N.D. Ill. 1987). Similarly, Congress and this Court have recognized that documents of the kind contemplated by Fed. R. Evid. 902 should be accepted as *prima facie* genuine. Fed. R. Evid. 901(a) advisory committee's note. As at least one court has held, once the *prima facie* burden of authenticity for purposes of admission has been met, the burden of proving that the document is not authentic should then shift:

> [O]nce a *prima facie* showing has been made to the court that a document is what its proponent claims, it should be admitted. At that point the burden of going forward with respect to authentication shifts to the opponent to rebut the *prima facie* showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document. The required *prima facie* showing of authentication need not consist of a preponderance of the evidence. Rather, all that is required is substantial evidence from which the trier of fact might conclude that a document is authentic.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505

F. Supp. 1190, 1219 (E.D. Pa. 1980), *rev'd in part on other grounds, sub nom, In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 284-85 (3d Cir. 1983).

Where court orders and judgments are concerned, the authorities have traditionally recognized that the burden of attack must, in the first instance, rest upon the party opposing enforcement. *See generally,* Restatement (Second) of Judgments §§ 64-82 (1982). Indeed, where impeachment is by extrinsic evidence, parties opposing enforcement must prove their defenses by a heightened standard — by "clear and convincing" evidence. *Id.* § 77. The need for public confidence in the finality of judgments requires nothing less. *See id.* at § 70, comment (a). It has been suggested that in the absence of such confidence, "the concept of finality itself would be rationally insupportable." *Id.*

The lower court rulings in the instant case undermine this well established reluctance to require that the offering party reach behind the court's certification to produce evidence establishing the authenticity of court orders. To place this burden in the first instance upon the proponent of the certified order, rather than shifting the burden to the opponent to rebut a presumption of authenticity, is to undermine automatically, and unnecessarily, the integrity of all court orders.

Under the lower court rulings in this case, before court orders could be given "full faith and credit" the opponent in any case could demand, without first producing a scintilla of evidence to the contrary, that the party relying upon the order come forward and prove by a preponderance of extrinsic evidence that the order is what it has been certified by a public official to be — an authentic, correct copy of an original court order. Such a system would result in chaotic uncertainty and delay in the enforcement of court orders.

Indeed, opponents of enforcement could easily demand that a party seeking enforcement be put to such proof in an effort to delay inevitable enforcement. Under

the standards embraced by the lower courts in this matter, it is submitted that a plethora of such "authenticity" proceedings would arise involving heretofore straightforward attempts to enforce judgments and other orders. In such proceedings parties could easily undermine finality by simply demanding that the proponent prove authenticity with evidence independent of the certified order. Until that burden is met opponents of enforcement would not be required to produce a shred of proof in support of their defense to enforcement.

Rather, under the rulings of the lower courts in this case, the proponent would first be required to establish by a preponderance of extrinsic evidence that the certified order is authentic. In the event that sufficient extrinsic evidence could not be produced (if, for example, the court file was missing and the parties or the judge were unavailable) the proponent could well be found not entitled to enforcement, having failed to carry its initial burden. In such a case, the defendant in the enforcement proceeding would receive a favorable ruling despite the fact that the defendant may not have introduced evidence in support of its defense. Petitioner submits that this scheme stands the order of proof on its head.

In addition to undermining finality, the lower courts' rulings would automatically add yet another round of discovery at the end of every case. Parties would be well advised as a matter of routine to take the depositions of judges and court personnel in order to preserve the record and meet their threshold burden in subsequent enforcement proceedings. Attendant discovery involving members of the judiciary, court personnel and court records would place in serious jeopardy the present ordered system of enforcement of orders and judgments.

Petitioner has found no other provision in the law of enforcement of domestic judgments and orders permitting a respondent in an enforcement proceeding to be relieved of its obligation in the first instance to submit

proof of its defense to enforcement. In the present case, the Magistrate improperly placed upon the Petitioner the initial burden of proving by a preponderance of extrinsic evidence the authenticity of the certified Orders. By relieving the Respondents of their obligation to first rebut a presumption of authenticity with evidence in support of their defense, the lower courts in this case have placed the entire operation of our system of enforcement of judgments and orders in serious question. Petitioner submits that this is precisely the type of issue that should be considered by this Court, and certiorari should therefore be granted.

B. The Decisions of the Lower Courts Have Raised a Conflict With Related Decisions of This Court and the Courts of Appeals

Traditionally, this Court has granted certiorari to consider claims that the courts of appeals have misconceived the meaning of a prior Supreme Court decision, *Wilkinson v. United States,* 365 U.S. 399 (1961), and upon the basis of an apparent inconsistency between and among decisions of the courts of appeals and the Supreme Court. *Egan v. City of Aurora,* 365 U.S. 514 (1961); *National Ass'n of Greeting Card Publishers v. United States Postal Service,* 462 U.S. 810 (1983). Petitioner submits that a grant of certiorari is appropriate in this case on each of the above grounds.

Congress and this Court have provided through Fed. R. Evid. 902(4), that extrinsic evidence of authenticity is not a condition precedent to the admissibility of certified copies of public records. Moreover, this Court has recognized that a document offered by a public officer whose duty it is to keep the originals should be received in evidence. *United States v. Percheman,* 32 U.S. 51 (1833). Thus, certiorari is appropriate as the Third Circuit's affirmance of the decision of the Magistrate is inherently inconsistent with these authorities.

In addition, this Court has traditionally granted certiorari to resolve conflicts among the circuit courts so that federal law will be uniformly applied in the intermediate federal court system. The United States Court of Appeals for the Fourth Circuit has held in *United States v. Wingard,* 522 F.2d 796 (4th Cir. 1975), *cert. denied,* 423 U.S. 1058 (1976), that under Rule 902:

> [A] document bearing a seal purporting to be that of the United States or an agency thereof and a signature purporting to be an attestation or execution is admissible into evidence without extrinsic evidence of its authenticity.

Id. at 797.

Similarly, the United States Court of Appeals for the Fifth Circuit in *United States v. Beason,* 690 F.2d 439 (5th Cir. 1982), *cert. denied,* 459 U.S. 1177 (1983), has held that to establish the authenticity of a document, extrinsic evidence of custody and of delegation of the document is not necessary where there is a signed certification by the public officer having actual legal custody of the record. The court found no requirement in Fed. R. Evid. 902 that the custodian secure further certifications of the delegation of custodial authority down from the head of the department or agency entrusted by law with custody of the document. *Id.* at 444.

In *Lim v. Mitchell,* 431 F.2d 197 (9th Cir. 1970), the United States Court of Appeals for the Ninth Circuit held that a certified copy of a certificate of identity presented a *prima facie* case of citizenship and the burden of proof shifted to the defendant to require it to rebut plaintiff's *prima facie* case and show that the certificate was obtained by fraud or error.

In *United States v. Carbone,* 798 F.2d 21 (1st Cir. 1986), the First Circuit Court of Appeals determined the burden of proof to challenge the authenticity and admissibility of tape recordings. The Court held that "the party

challenging the recordings bears the burden of showing that they are inaccurate." *Id.* at 24.

Petitioner submits that these authorities conflict and are inconsistent with the Third Circuit's affirmance of the Magistrate's findings in this case. In the instant matter, the Magistrate required that the Petitioner carry the initial burden to present extrinsic evidence to prove that the certified Orders are authentic. The Magistrate did not shift the burden to the party challenging authenticity to introduce evidence in support of its challenge. The existing conflict significantly impairs the uniformity of decisions on an important federal issue. Moreover, proper assignment of the burden of proof of authenticity of self-authenticating documents is likely to be a continuing issue facing the lower courts that can be effectively resolved only by this Court. Accordingly, certiorari is appropriate based upon a conflict between and among the decisions of the circuit courts and this Court.

II. THE FAILURE OF THE MAGISTRATE TO PROPERLY ASSIGN THE BURDEN OF PROOF, OR TO CLARIFY PRIOR TO OR DURING TRIAL WHICH PARTY CARRIED THAT BURDEN, RESULTED IN A DENIAL OF DUE PROCESS.

The essence of due process is fundamental fairness. *Lassiter v. Department of Social Services,* 452 U.S. 18, 25-26 (1981). In an appropriate case, due process requires that an individual be given notice and the opportunity to be heard. The opportunity to be heard must be a meaningful one – it must be afforded at a meaningful time and in a meaningful manner. *Parratt v. Taylor,* 451 U.S. 527, 540 (1981); *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

Where a hearing is required, due process further mandates a full and fair hearing before an impartial

tribunal. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329 (1971); *Hansberry v. Lee,* 311 U.S. 32, 43 (1940); *Hardy v. Johns-Manville Sales Corp.,* 681 F.2d 334, 338 (5th Cir. 1982). The essence of such a hearing is a decision containing findings based on sufficient evidence. *Brunnenkant v. Laird,* 360 F. Supp. 1330, 1331-32 (D.D.C. 1973). In addition, a judgment may be rendered void where there is "a departure from established modes of procedure . . . or where the procedural defects are of sufficient magnitude to constitute a violation of due process." *Fehlhaber v. Fehlhaber,* 681 F.2d 1015, 1027 (5th Cir. 1982), *cert. denied,* 464 U.S. 818 (1983).

The failure of the Magistrate to properly allocate the burden of proof — or to advise the Petitioner prior to or during trial which party carried that burden — is a procedural defect constituting a denial of due process. *Cf. Santosky v. Kramer,* 455 U.S. 745, 757 (1982) ("Since the litigants and the fact-finder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance."). Despite Petitioner's attempts to obtain pretrial and trial rulings on the question of the burden of proof, Petitioner was left in the dark on this essential question until *after* trial. At that time, there was no opportunity afforded to bring forth evidence that, had the burden at least been timely assigned, might well have been introduced in Petitioner's case in chief.

Instead, Petitioner was blindsided by an improp . ruling on the burden issue after trial. During trial Petitioner was precluded by the Court from introducing evidence in its rebuttal case to impeach and rebut inferences created by Respondent's expert. In so excluding Petitioner's rebuttal evidence, the Magistrate indicated that such evidence was more properly introduced as part of Petitioner's case in chief. But at no time prior to the issuance of her decision after trial did the Magistrate advise the Petitioner that it bore the burden of

anticipating in its case in chief Respondent's attacks upon the Orders. Further, at no time prior to or during trial did the Magistrate fairly advise the parties that Petitioner's *prima facie* burden would require introduction of evidence extrinsic to the self-authenticating orders themselves. Fed. R. Evid. 902.

The Magistrate's failure to properly assign the burden was compounded by her subsequent findings. As noted, due process requires findings premised upon sufficient evidence. *See, e.g., Brunnenkant v. Laird,* 360 F. Supp. at 1331-32. In other contexts, this Court has held that a judgment supported by no evidence on an essential element violates due process. *See, e.g., Vachon v. New Hampshire,* 414 U.S. 478 (1974).

As discussed previously, Respondents introduced no evidence directly rebutting the testimony offered by Petitioner's expert that the Orders are authentic. Instead, Respondents adduced evidence tending only to prove that the 75 year old Orders were the sole record that Respondents could find of the case and the Orders at issue, and that they are not characteristic of contemporary documents filed in the issuing court. Petitioner submits that this evidence alone is insufficient to support the Magistrate's findings. Petitioner has been deprived of the substantial property rights embodied in the Orders through a hearing process that was rife with error. The magnitude of the Magistrate's errors constitutes a denial of due process, warranting review by this Court. *Mathews v. Elderidge,* 424 U.S. 319 (1976).

CONCLUSION

For all of the above reasons, this petition for certiorari should be granted.

Respectfully submitted,

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August 1, 1989

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3819

POCHAHONTAS INSURANCE & TRUST CO.;
POCHAHONTAS INSURANCE CO.; & INSURANCE
CORPORATION OF AMERICA;
FIRSTCORP INSURANCE GROUP

v.

J.S DARST, INSURANCE COMMISSIONER STATE OF
WEST VIRGINIA, et al.; STATE OF FLORIDA, WILLIAM
GUNTER, COMMISSIONER, DEPARTMENT OF
INSURANCE AND TREASURER; STATE OF CONNECTICUT
and PETER W. GILLIES, INSURANCE COMMISSIONER;
ROBERT D. HAASE, COMMISSIONER OF INSURANCE,
STATE OF WISCONSIN; AND WILLIAM D. HAGER,
COMMISSIONER OF INSURANCE, STATE OF IOWA

INSURANCE CORPORATION OF AMERICA,
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 87-406)

Submitted Under Third Circuit Rule 12(6)
April 26, 1989

Before: HIGGINBOTHAM, STAPLETON and WEIS, *Circuit Judges.*

(Filed May 5, 1989)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

The judgment of the Magistrate is affirmed for the reasons noted by the opinion of Magistrate Sue L. Robinson. Any ruling as to Federal Rules of Evidence 901 and 902, even if possibly erroneous, were not prejudicial because the documents were admitted for the purpose of determining their genuineness and authenticity. The court did not abuse its discretion when it made various pretrial discovery and evidentiary rulings.

TO THE CLERK:

Please file the foregoing opinion.

A. Leon Higginbotham

Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

POCAHONTAS INSURANCE & TRUST CO., POCAHONTAS INSURANCE CO., INSURANCE CORPORATION OF AMERICA, AND FIRSTCORP INSURANCE GROUP, *Plaintiffs,* v. J.S. DARST, INSURANCE COMMISSIONER STATE OF WEST VIRGINIA, et al.; STATE OF FLORIDA, WILLIAM GUNTER, COMMISSIONER, DEPARTMENT OF INSURANCE AND TREASURER; STATE OF CONNECTICUT AND PETER W. GILLIES, INSURANCE COMMISSIONER: ROBERT D. HAASE, COMMISSIONER OF INSURANCE, STATE OF WISCONSIN; and WILLIAM D. HAGER, COMMISSIONER OF INSURANCE, STATE OF IOWA, *Defendants.*	:	Civil Action No. 87-406-SLR

Robert C. O'Hara, Esquire, Bayard, Handelman & Murdoch, P.A., Wilmington, Delaware, Peter M. Feaman, Esquire, Marchbanks & Feaman, P.A., Boca Raton, Florida, attorneys for plaintiffs.

William J. Cattie, Esquire, Heckler & Cattie, Wilmington, Delaware, Howard M. Berg. Esquire, Berg, Bifferato, Tighe & Cottrell, Wilmington, Delaware, William J. Prensky, Esquire, Department of Justice, Hartford, Connecticut, Fred M. Haskins, Esquire, Department of

Justice, Des Moines, Iowa, Gabriel Mazzeo, Esquire, Department of Insurance, Tallahassee, Florida, Robert W. Larsen, Esquire, Department of Justice, Madison, Wisconsin, attorneys for defendants.

MEMORANDUM OPINION

November 16, 1988
Wilmington, Delaware
SUE L. ROBINSON, U.S. Magistrate

This is the decision of the Court after trial on the question of whether two orders ostensibly issued in 1911 and 1914 by this Court's predecessor, the United States Circuit Court of Delaware, are authentic. For the reasons that follow, I conclude that the evidence of record fails to demonstrate that these orders are authentic. Consequently, this case must be dismissed for lack of subject matter jurisdiction.

PROCEDURAL BACKGROUND

This case was instituted by plaintiffs Pocahontas Insurance and Trust Co., Pocahontas Insurance Co., Insurance Corporation of America, and Firstcorp Insurance Group (hereinafter "plaintiffs") in July of 1987 seeking to invoke the power of this Court to enforce against the defendants "a prior judgment of this Court, formally known as the Circuit Court of Delaware in that certain action entitled *Pocahontas Insurance and Trust Co., and Pocahontas Insurance Co., and Insurance Corporation of America, and Firstcorp Insurance Group v. J. S. Darst, Insurance Commissioner State of West Virginia, et al.,* entered on February 5, 1914. . . ." (Hereinafter referred to as "the 1914 order") (D.I. 1) Plaintiffs allege in their Motion for Entry of an Order to Show Cause and for an Injunction that defendants, the Insurance Commissioners from the States of Florida,

Connecticut, Wisconsin and Iowa,[1] have "seriously impaired the rights of plaintiffs by prohibiting them from carrying on business in the respective defendants' states . . ." in violation of the 1914 order. (D.I. 1) Attached to plaintiffs' motion is a copy of the 1914 order which states in part as follow:

> Therefore, it is Ordered that the four Plaintiffs and each one's seventy-one divisions shall be free from any regulations by and Local, State (Insurance Departments and/or Commissioner or by the State Administrator's Office) or by Federal regulations what-so-ever.

(D.I. 1, Ex. A) This copy of the 1914 order is captioned as such:

The United States Circuit Court of Delaware
at Dover Delaware

Pocahontas Insurance & Trust Co., & Pocahontas Insurance Co., & Insurance Corporation of America, & Firstcorp Insurance Group — Final Order

Plaintiffs

vs.

J. S. Darst, Insurance Commissioner State of West Virginia, et al

The caption includes no docket or other identifying number, is handwritten, and is entered "by the Panel s/Ben Green Substitute Judge" (i.e., no original judicial signature appears on the face of the document). On page three of the 1914 order appears a certification by Deputy Clerk K. M. Keys from the United States District Court

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1. Although the caption names as defendants "J. S. Darst, Insurance Commissioner State of West Virginia, et al.", apparently this was done to conform the instant caption to that of the 1914 order, as opposed to there being any present controversy with those defendants.

for the District of Columbia (hereinafter "the District of Columbia").

The defendants responded, *inter alia,* by contesting the authenticity of the 1914 order and, thus, the jurisdiction of this Court to hold them in civil contempt for failure to honor the order. (D.I. 4, 7, 13, 17) By an amended motion filed in December 1987, plaintiffs added to their jurisdictional arsenal another order ostensibly issued by the "United States Circuit Court of Delaware at Dover, Delaware" in the case captioned "Pocahontas Insurance & Trust Co., Plaintiff vs. Pocahontas Insurance Co. Defendant; Pocahontas Insurance Co., Plaintiff vs. Insurance Corporation of America and First Corporation Insurance Group." (Hereinafter "the 1911 order") (D.I. 44, Ex. B) The 1911 order, like its 1914 counterpart, is handwritten; there is no identifying docket or other number, there is no original judicial signature (again, the conformed signature of "Ben Green, Substitute Judge" appears). Attached to plaintiffs' amended motion as Exhibit B is a copy of the 1911 order, certified as a "true copy" by a deputy clerk from the District of Columbia. According to plaintiffs' amended motion,

> [i]n accordance with Exhibit "B" attached hereto and made a part hereof, on December 8, 1911, this Court, by and through its predecessor in interest, the Circuit Court at Dover, Delaware, issued a final order of clarification with reference to Insurance Corporation of America holding that:
>
> "The Court finds that each corporation division can operate in all the states, territories and the District of Columbia under the original Charter as set out in Exhibit E."

(D.I. 44, at 4)

By Order dated February 8, 1988, Chief Judge Murray M. Schwartz limited discovery in the case to the "core issue" described as

> the authenticity and facial validity of the orders sought to be enforced herein. Included in the core issue among other questions are the questions of the existence of a federal district court at the time of the issuance of the orders, the identity and authority of the judge, and the scope of that court's jurisdiction. The parties are cautioned and advised that they should not proceed as if the burden on this core jurisdictional issue belongs solely to parties adversary.

(D.I. 48, ¶5)

By Order of Reference dated June 28, 1988, Chief Judge Schwartz referred the case to the United States Magistrate on consent of all the parties. (D.I. 83) Discovery was concluded in July, 1988 and trial on the core issue of authenticity of the 1911 and 1914 orders (hereinafter referred to as "the orders") was held before the Magistrate on July 27, 1988. The following was evinced at trial.

Historical Background

Plaintiffs tendered the testimony of Erwin C. Surrency, a legal historian prepared to offer an expert opinion as to the authenticity of the two orders based on his general knowledge and understanding of contemporary (i.e., early 1900's) legal practices and procedures. Professor Surrency admittedly conducted no case-specific research (presumably purposefully).

Defendants proffered the testimony of several records custodians who did conduct case-specific research and whose testimony was denominated as factual, not expert. (D.I 105, at 165-66) These witnesses

included Sheila Joy, an employee of the U.S. Department of Justice charged with keeping records of presidential appointments (defendants' trial ex. 14); Mary I. Ronan, an archivist at the National Archives in Washington, D.C. (defendants' trial ex. 15); and Dr. Robert J. Plowman, Director of the Philadelphia branch of the National Archives. (D.I. 105, at 139-62)

The Court

There is no dispute among the parties concerning the existence of the United States Circuit Court, which was established in the Judiciary Act of 1787 as the primary trial court in the federal system. It had jurisdiction over civil cases in both law and equity, as well as over major criminal cases. The United States District Court, on the other hand, was primarily an admiralty court, with additional jurisdiction over cases involving revenues of the United States and minor crimes. By virtue of the Judiciary Code of 1911, the two courts were merged effective January 1, 1912, with the United States District Court surviving as the federal trial court. (D.I. 103, at 88-89; defendants' trial ex. 16)

Having demonstrated the existence of the United States Circuit Court of Delaware at the relevant time, Professor Surrency testified that, although the District and Circuit Courts of Delaware were statutorily designated to sit in Wilmington, Delaware, the judges of the federal courts generally "had the authority to hold hearings on matters in equity and admiralty other than at the seat of the court, provided due notice was given to the parties involved." (D.I. 103, at 89-90) Therefore, it was his opinion that, within a reasonable degree of historical certainty, the cases at issue could have been heard in Dover, Delaware in 1911 and 1914.

Dr. Plowman testified that the Philadelphia branch of the National Archives has custody of records from the District of Delaware dating back to 1789 (D.I. 105, at

144), with "continuous" records maintained from 1870 forward.[2] (D.I. 106, at 161) In conducting his search for the 1911 and 1914 orders, he found no cases that were filed at Dover, Delaware. (D.I. 105, at 159-60, 162)

The Judge

Professor Surrency knew of no such statutory designation as "substitute judge." (D.I. 103, at 91) Neither did he find in his research for the article "Federal District Court Judges and the History of their Courts" any record of a "Ben Green" having sat as a federal judge. (D.I. 103, at 96, 105; defendants' trial ex. 5) He testified, however, that courts in equity matters "[t]he majority of times would appoint a master in chancery." According to the Professor, since the case at issue[3] would have been heard in equity "the Judge would probably have referred this to a master in chancery. I would presume in Delaware, instead of designating himself as master in chancery, he would have used a term such as substitute judge . . . [W]e know that the federal courts often appointed commissioners in chancery to take testimony, make recommendations, and so forth. Probably he assigned himself, as local custom will have it, as substitute judge rather than master in chancery." (D.I. 103, at 96-7) Consequently, the fact that a "substitute judge" Ben Green signed the orders does not diminish their authenticity in the Professor's opinion. (D.I. 103, at 96)

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2. It should be noted, however, that the Philadelphia Branch did not receive the records from this time period until 1987; it is unclear from the record where these documents were stored until 1978. (D.I. 105, at 174)

3. Although the 1911 and 1914 orders have different case captions and no identifying court number, for purposes of this proceeding I will hereafter refer to the alleged historical "case" in the singular.

On cross-examination, the following was evinced from Professor Surrency regarding the above testimony. Although the Professor's hypothesis is based on the case's being one in equity, the orders are not labeled "equity", as had been the practice of the federal courts before the merger of law and equity. (D.I. 103, at 108) Moreover, Professor Surrency was unaware of any case in the Delaware Court of Chancery (the State's court in equity) where the term "substitute judge" was used. Neither was the Professor able to provide any insight as to why orders such as the ones under review would be issued and signed by a commissioner or master sitting by designation, as opposed to a constitutional judge, a question made that much more troubling by the use of the phrase "for the Panel" which appears above the designation of "s/Ben Green Substitute Judge" in the 1914 order (i.e., could a master in chancery issue such a broad-reaching order for a panel of constitutional judges?). (D.I. 103, at 108-13)

According to the deposition testimony of Sheila Joy and Mary Ronan, the records in their custody contain no evidence of a judge Ben Green during the relevant time period. Dr. Plowman, in his search related to the orders, found neither evidence of a judge Ben Green nor evidence that the term "substitute judge" had been used on any pleadings other than the ones at issue. (D.I. 105, at 160) Finally, "Ben Green" was not listed as an attorney in Wilmington, Delaware in 1911 or 1914. (Defendants' trial exs. 9, 10)

The Orders.

As noted above, the orders are handwritten, with no identifying court numbers. In his testimony in this regard, Professor Surrency observed that there were no national standards as to how federal court records were to be kept in 1911. (D.I. 103, at 99) Thus, the minute books kept by judges were used for many purposes and

included various kinds of information, depending on the court and the judge. (D.I. 103, at 100) And although the Professor could not state from his own personal knowledge "when the numbering system, docket came into common practice . . . I would say that Delaware being a very small district, and I would presume not much litigation, I would be very much surprised in 1900 that the District Court of Delaware had very much litigation before it that would be necessary to keep a docket number on the cases." (D.I. 103, at 100-102) Therefore, the fact that the orders do not have a number printed on them does not diminish or detract from their authenticity in Professor Surrency's opinion. (D.I. 103, at 100)

In conducting his search for the 1911 and 1914 orders, Dr. Plowman found the federal court in Delaware to have maintained law, equity, criminal, admiralty and bankruptcy docket books for the time period 1900-1920. He found that the Circuit Court in Delaware used docket numbers in equity cases beginning in 1843 with "No. 1" until January 1, 1912, at the time of the merger between the District and Circuit Courts. The numbering system continued for equity cases in the District Court; "[s]o, in other words, No. 312 ended the Circuit Court; No. 313 started the District Court." If there were a case pending in the Circuit Court in 1911, the number was continued in 1912 in the District Court; however, after January 1, 1912, the pleadings were captioned "District Court". (D.I. 105, at 151-52, 158-59) In reviewing the docket books, the minute books, the judgment indexes, and the actual case files for equity and law cases for the period 1900-1920, Dr. Plowman found there was an actual case file for each of the consecutive equity docket numbers assigned. Dr. Plowman opined that the docket numbers on the case files appeared to be made contemporaneously with the pleadings contained therein. (D.I. 105, at 155-57) Despite the existence of an apparently organized record-keeping system in Delaware, Dr. Plowman found not one record indicating that the case at issue or

the orders at issue had been filed contemporaneously in the Circuit or the District Courts of Delaware. (D.I. 105, at 160-62) This finding of an absence of any telling records is consistent with the findings of John R. McAllister, Jr., Clerk of the United States District Court for the District of Delaware, and of James F. Davey, Clerk of the United States District Court for the District of Columbia, who similarly aver an absence of any records evidencing the existence of the case or orders at issue. (Defendants' trial exs. 1, 13)

Professor Surrency was untroubled by the fact that the cases cannot be found in the National Archives in Philadelphia or any other court. Having noted that he has found things to be missing out of the Archives,[4] Professor Surrency "suppose[d] this case is filed under some other caption rather than the caption given here of Pocahontas Insurance and Trust Co. versus Pocahontas Insurance Co. It is possible that it's filed under something else." (D.I. 103, at 102) Moreover, the fact that the copies of the orders were certified, not by the District Court in Delaware but by the District Court in the District of Columbia, was not troublesome to the Professor. As a "hypothetical" explanation (D.I. 103, at 115), Professor Surrency supposed "that a copy was transferred from the United States District Court, and they had possession of those records in the District Court of Columbia for some reason, for some case." (D.I. 103, at 99)

Professor Surrency further testified that, although the typewriter was available for use in the early 1900's, federal judges "probably" wrote out their orders because they had no secretarial help. The Professor, therefore, opined that the fact that the two orders were handwritten did not diminish or detract from their authenticity. (D.I. 103, at 90-91)

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4. Specifically, the "minute book of the vice admiral of the court in Pennsylvania, colonial court." (D.I. 97)

Again, Dr. Plowman in his review of the actual records filed in the Circuit and District Courts of Delaware for the period 1900-1920, found that the majority of the documents for that period were typewritten. (D.I. 105, at 166; *see also,* D.I. 103, at 117-20)

In sum, defendants proffered factual evidence at trial tending to prove that the only record of the case or orders at issue are the orders themselves, and that the orders themselves are not characteristic of contemporary documents filed in the issuing courts. Plaintiffs, on the other hand, tendered the expert opinion of Professor Surrency to the effect that the 1911 and 1914 orders "*could* be authentic" (D.I. 103, at 87, 123) (emphasis added) and that this opinion as to authenticity "is not diminished by the fact that they are handwritten, that they are from the Circuit Court of Delaware at Dover, that they are entered by a substitute judge Ben Green, and without any case number. . . ." (D.I. 103, at 103) This opinion was based on Professor Surrency's general knowledge regarding the absence of a uniform practice and procedure in the federal judicial system, not on any research of the records of the Circuit Court of Delaware in connection with this case. (D.I. 103, at 122) It is crucial to note at this juncture that after the luncheon recess, plaintiffs put the Professor on the stand again to "clarify" his opinion:

> I believe the question was asked me whether I believed that the document submissions shown to me were authentic. And I used the word, I said, "They could be." What I meant, what I intended by the entire tenor of my testimony and everything, was to point out that it doesn't surprise me that they are written, it doesn't surprise me that it doesn't have a docket number on it. All these factors, *and basing upon the fact that they were found in a court file,* that they have to be authentic.

(D.I. 105, at 133-34) (emphasis added) In other words,

Professor Surrency's opinion on the authenticity of the orders is grounded upon their certification by the deputy clerks from the District of Columbia.

DISCUSSION

At the outset, Fed.R.Evid. 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." As recognized by the Third Circuit,

> [t]he burden of proof for authentication is slight. "All that is required is the foundation from which the fact-finder could legitimately infer that the evidence is what the proponent claims it to be."

Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 927 (3d Cir. 1986), *citing, McQueeney v. Wilmington Trust Company*, 779 F.2d 916, 928 (3d Cir. 1985). *See also, In Re Japanese Electronic Products*, 723 F.2d 238, 285 (3d Cir. 1983), *rev'd on other grounds sub. nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *United States v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976). As explained by Judge Weinstein in his treatise on evidence,

> [t]he central point is that whenever proffered evidence is challenged on grounds of authenticity or identity, it should be admitted once a prima facie case has been made on the issue. Such a finding of authenticity does not guarantee that the evidence will be considered by the trier of fact. *While it permits admission of the evidence it is . . . subject to the jury's ultimate determination as to its genuineness. The opposing party may introduce evidence disputing genuineness and argue the point to the jury. Once the evidence is admitted the question becomes one of credibility and probative force* and

> the trier may ultimately disbelieve the proponent's proof and entirely disregard or substantially discount the persuasive impact of the evidence admitted. The rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.

5 Weinstein's Evidence ¶901(a)[01] (1988) (emphasis added) (footnotes omitted).

While Fed.R.Evid. 901 requires documents to be authenticated as a preliminary to their being admitted into evidence, Rule 902 makes self-authenticating certain classes of writings where various considerations[5] make it unreasonable to require further authentication.

> The trial judge should, therefore, not use his discretion to exclude documents coming within Rule 902's classifications. The opponents of the evidence are in no way precluded from contesting authenticity and evidence may be presented to the jury to be considered in deciding how much weight to give the documents; they are only precluded from disputing admissibility on the ground of authentication.

Id. at ¶902[01].

Pursuant to Fed.R.Evid. 902(4), plaintiffs tendered copies of the 1911 and 1914 orders as certified by deputy clerks from the District of Columbia. Rule 902(4) provides in relevant part that:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

---

5. "[D]ifficulty, ease of detection and criminal sanctions . . . generally make the danger of forgery very slight in connection with this limited class of self-authenticating documents." *Id.* at ¶902[01].

> (4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office . . . certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this Rule. . . .

Rule 902(4) is based on the recognition that original public records, which ought not to be constantly removed, should be permitted to be evidenced by "a copy given by a public officer whose duty is to keep the original." *Id.* at ¶902(4)[01]. As further explained in that volume,

> [i]n the United States it was early settled that the official custodian of a document had implied power to certify copies. The custodian could only certify copies required by law to be recorded or kept by him. . . .Rule 902(4) requires no additional certification to the fact of custody or to the custodian's authority. The purported custodian's signature under a statement that he has custody of the original and that the copy is correct, whether or not accompanied by a seal, suffices to assure the accuracy of the copy as a substitute for the original.

Id.

By the deposition testimony of deputy clerks Karen M. Keys and Alan Rambow and that of Clerk James F. Davey, it is apparent that the certifications are facially valid at least; i.e., the deputy clerks had the general authority to certify copies within the custody of the court and their signatures, along with the court's seal, are fixed to the certified copies. In light of the language and intent of Fed.R.Evid. 901 and 902, the 1911 and 1914 orders were admitted into evidence as plaintiffs' trial

exhibits 4 and 3, respectively. The question remains as to what probative weight these certified copies are entitled[6]

Defendants maintain that the certified copies should be accorded no probative weight because the record does not demonstrate that the District of Columbia had actual custody of the orders. The depositions of Karen M. Keys (plaintiffs' trial ex. 13), Alan Rambow (plaintiffs' trial ex. 14), and James F. Davey (plaintiffs' trial ex. 15; defendants' trial ex. 13) were admitted into evidence in this regard.

Among the duties of Karen Keys as a deputy clerk for the District of Columbia since December of 1984 was the certification of court files. In Describing the certification process, Ms. Keys testified that

> [you just make sure that you have what an individual is requesting, whether it is by mail or whether they come into the office, and you just quickly review the document, *make sure that it has a court, well, filing date,* and just check for the judge's, not opinion, but the judge's signature.

---

6. Plaintiffs argued at trial that the mere fact of certification creates a presumption of validity, thus shifting the burden of proof to defendants "to come forward with substantial evidence rebutting the presumption." (D.I. 97, at 11) Plaintiffs did not cite any caselaw decided under the Fed.R.Evid. in support of this proposition, however, and I have found none. Fed.R.Evid. 301; 5 Weinstein's Evidence ¶¶901(a)[01], 902[01]. Therefore, I conclude that admission of the orders under Fed.R.Evid. 902(4) does not serve to shift the burden of proving the authenticity of the orders to defendants. And, indeed, plaintiffs in their post-trial brief accept the burden of proving the "authenticity of the orders by clear and convincing evidence by way of official documents, depositional testimony of the records keepers and live testimony of the recognized authority on the history of the federal courts." (D.I. 107, at 2) The burden of proof generally assigned to plaintiffs in a civil case is to produce evidence which, considered in the light of all the facts, leads the trier of fact to believe that what plaintiffs claim is more likely true than not.

> You make a copy and you use the stamp that states that it is, indeed, a true copy from the court and you sign it and you seal it with the court seal.

(Plaintiffs' trial ex. 13, at 6-7) (emphasis added) When asked whether she followed this procedure in certifying the 1914 order (plaintiffs' trial ex. 3), she responded:

> Well, obviously I didn't, okay, and to explain that, this document does not have the United States District Court filing stamp.
>
> Now, I don't remember, okay, I can only assume that this document, well, I don't know whether it was attached to something else or if it was just by itself, I really don't recall that at all, but it is not stamped by the United States District Court here in Washington.

(Plaintiffs' trial ex.13, at 9) Ms. Keys does have a specific recollection, however, of retrieving the "original" of the 1914 order from "some file in the court", although she does not remember how she found the court docket number. (Plaintiffs' trial ex. 13, at 12-13)

Alan Rambow is the deputy clerk who certified plaintiffs' trial exhibit 4, the copy of the 1911 order. Among his duties as a deputy clerk since July of 1985 is the certification of court files. (Plaintiffs' trial ex. 14, at 5-6) His description of the certification process is as follows:

> When I certify a document I have to insure that I am making a copy from an original from our files. Once the copy is made I stamp it with a rubber stamp we have, which has a place for my signature.
>
> I sign it, date it, and, if it is not the cover page of the document in question, that is, with our caption and case number, I put the case number on it, and then I emboss it with a seal.

(Plaintiffs' trial ex. 14, at 7) His testimony continued as such:

> Q. In order for you to have signed and sealed that document [the 1911 order], would the original of that document have to have been in your possession at the time?
>
> A. Not necessarily. For example, if you bring in a document, a copy of a document and file it as an exhibit attached to something you were filing with this court, the original would not have been in our possession. Presumably it is wherever, in whichever court it was filed in originally, or wherever. I think for the purposes of certification, an original is an original if it has been filed with the court, even if it is a copy of another document when the original is elsewhere.
>
> Q. Would this have to have been part of the court records that you had here at the time when you certified that document?
>
> A. Yes.

(Plaintiffs' trial ex. 14, at 9)

The Clerk of the United States District Court for the District of Columbia, James F. Davey, testified at deposition that the District of Columbia has custody only of its own decisions; thus, the 1911 and 1914 orders would only be part of that Court's records as exhibits to a District of Columbia case; moreover, all such exhibits are supposed to bear a District of Columbia filing stamp. (Defendants' trial ex. 13, at 6-7, 16) By affidavit, Mr. Davey averred that:

> Two employees of the Clerk's Office of the United States District Court for the District of Columbia certified copies of the 1911 decision and the 1914

> decision. Neither employee remembers who requested certified copies of the decisions nor what case these decisions were associated with;
>
> Since these copies of the 1911 decision and the 1914 decision were certified, neither I nor anyone under my direction has been able to locate these decisions in the court records or identify the case they came from. . . .

(Defendants' trial ex. 13, ex. C)

Defendants argue from this evidence that these orders are not entitled to any probative weight by virtue of their certification because, *inter alia,* the District of Columbia is not the custodian of the original orders and, therefore, not authorized to certify copies of the original. (D.I. 108, at 20-36) Plaintiffs argue in response that the testimony of deputy clerk Keys, indicating that the original 1914 order was on file in the District of Columbia at the time of certification, is sufficient proof that that Court was the custodian of the records. (D.I. 112, at 9-10)

I reject, however, plaintiffs' attempts to use the certification as a bootstrap to prove authenticity, even when the certification process itself has been questioned. (See, e.g., D.I. 112, at 14) Indeed, plaintiffs' reliance on caselaw such as *United States v. Beason,* 690 F.2d 439 (5th Cir. 1982), *cert. denied,* 459 U.S. 1177 (1983)[7] is entirely misplaced. The orders at issue have been admitted pursuant to Fed.R.Evid. 902. Defendants' dispute as to the genuineness of the orders now involves questions of credibility and probative force. As noted by Judge Weinstein, once documents are

---

7. *Beason* stands for the proposition that "[c]ertification by the 'officer having legal custody of the record' satisfies the requirements of Fed.R.Evid. 902. Extrinsic evidence of custody and of delegation is not necessary where, as here, there is a signed certification by the public officer having legal custody of the documents." 690 F.2d at 444.

admitted pursuant to Fed.R.Evid. 901 and 902, "the trier [of fact] may ultimately disbelieve the proponent's proof and entirely disregard . . . the persuasive impact of the evidence admitted." 5 Weinstein's evidence ¶901(a)[01].

On the question of credibility, I find the testimony of Ms. Keys and Mr. Rambow to be less credible than that of Clerk of Court Mr. Davey, who testified that the two orders could only be part of the records of the District of Columbia as exhibits to a District of Columbia case, and that all exhibits to District of Columbia pleadings are required to have a District of Columbia filing stamp on them. Neither the 1911 nor the 1914 order bears such a stamp. More significantly, perhaps, is the absence on the orders of any certification from the issuing Delaware court or its record-keeper, meaning that even if I were to assume that copies of these orders were "in some file" in the District of Columbia, these copies were not certified pursuant to Fed.R.Evid. 902 and cannot now serve as the basis for further certification.

More persuasive than the certification of the copies of the orders is the glaring absence of any documentary evidence (save for the certified copies of the orders themselves) corroborating the existence of the case or orders at issue, raising grave doubts about the existence of the original documents in the first instance. Plaintiffs contend that their burden does not include explaining how the original Delaware file could have gotten to the District of Columbia; using their bootstrap method, they maintain that the certification process, as attested to by the deputy clerks, is sufficient to prove that the original file was there and has just been misplaced. (D.I. 112, at 11, 14) If there were any independent proof that the case was bona fide, perhaps this argument would fly in light of Professor Surrency's testimony that record-keeping in the federal judicial system has been a non sequitur. Instead, the argument is circular and incredible.

Without credible proof that the case existed in the first instance, Professor Surrency's testimony, albeit of

historical interest, also bears little probative weight. The two documents by all accounts are characterized by a series of "anomalies". (D.I. 107, at 3) Plaintiffs contend that these "anomalies" all have explanations rooted in the absence of a uniform federal procedure at the time the orders were issued. As demonstrated *supra,* however, this general historical premise is not reflected in the evidence of record. During the relevant time period, documents routinely were typewritten and docket numbers routinely were given in the federal courts in Delaware. Interestingly, neither plaintiffs nor Professor Surrency proffered any other examples of cases, federal or state, which use the term "substitute judge"[8], which evidence the Delaware federal court sitting in Dover, or indeed which evidence any, let alone all, of the "anomalies" present in the orders at issue. Most significantly, in the absence of the certification, the best plaintiffs' expert could do was to opine that the orders "could be authentic". His opinion was upgraded after some thought over the luncheon recess: The orders had to be authentic because "they were found in a court file". His opinion, therefore, like the rest of plaintiffs' case, is self-serving and legally untenable.

CONCLUSION

Considered in the light of all the facts, plaintiffs have failed to prove by a preponderance of the evidence that the 1911 and 1914 orders are more likely authentic than not. Consequently, this case must be dismissed for lack of subject matter jurisdiction. An Order consistent with this Opinion shall issue contemporaneously.

---

8. The authority cited by plaintiffs in this regard, *Corpus Juris Secundum,* is hardly impressive. (D.I. 107, at 6) Neither is it accurate to compare the position of the United States Magistrate, who has statutorily defined authority, with that of a "substitute judge with questionable authority." (D.I. 107, at 7)

APPENDIX C

In the United States Circuit Court of Delaware

at Dover Delaware

Pocahontas Insurance + Trust Co., +
Pocahontas Insurance Co., +
Insurance Corporation of America, + } Final Ord
Firstcorp Insurance Group.

Plaintiffs

vs

J. D. Darst, Insurance Commissioner
State of West Virginia, et al

And Now, This 5th day of February, 1914, upon Consideration of Plaintiffs Compiant, depositions of all parties, and a full hearing, the Court does hereby find as follows:

A final Order & Clarification was entered on December 8th 1911 by this Court, and which sets forth certain information and findings which are still in effect, and which shall remain in effect so lo as these Corporations + their divisions shall desir to operate in all States and Territories and the District of Columbia.

The Court finds also that the deposits which ar set out in the December 8th, 1911 Order are still on deposit with the States and Territories and District of Columbia, and are drawing interest yearly, and shall continue to appreciate and compound yearl and that the same shall never be removed from the holders, but shall remain there to back the Corporations and their severity - one divisions

BEST AVAILABLE COPY

And Now, the matter dealing with the "Insurance Commissioners" and the right to regulate these four Plaintiffs and each one's seventy-one divisions and the eight other corporations. The Court finds that the Four Plaintiffs and their seventy-one divisions and the eight other corporations are "Stand Alone" Insurance Corporations and are not in any way subject to regulation by any Insurance Department, Commissioner or any other official of any State, Territory or the the District of Columbia.

This Final Order shall apply to all Insurance Departments in all States and Territories and the District of Columbia Defendants to this Case. Service of process has been acknowledged by either the Governor of each State, Territory and the District of Columbia, or its agent, and the same is of record in this case.

Therefore, it is Ordered that the four Plaintiff and each one's seventy-one divisions shall be free from any regulations by any Local, State Insurance Department and/or Commissioner or the State Administrator's Office) or by Federal regulations what-so-ever. Further, the deposits shall not be removed, but shall appreciate and Compound yearly to support each Plaintiff, the eight independent Insurance Corporations and the seventy-one divisions of each of the plaintiffs.

BEST AVAI

-o-

Entered this 5th day of February, 1914, at Beckley, West Virginia by the Panel

s/ Ben Green
Substitute Judge

Admitted to record in the Ex Officio Insurance Commissioner's Office of West Virginia on February 26, 1914, and copies written and mailed to all State and etc. this day.

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK
By D. M. Keys
Deputy Clerk

LABLE COPY

APPENDIX D

BOOK 353 PAGE 106

In The United States District Court of Delaware.

At Dover, Delaware.

Pocahontas Insurance and Trust Company
Plaintiff
vs.
Pocahontas Insurance Company
Defendant

Pocahontas Insurance Company
Plaintiff
vs.
Insurance Corporation of America and
First Corporation Insurance Group.

Final Order of Clarification

And now, this 8th day of December, 1911, upon consideration of the plaintiffs and defendants and all the motions presented to date, the Court has decided to reopen and hear final arguments. The Court makes the following findings after hearing the arguments, reviewing the documents and reviewing the Special Commissioner's reports, and it is hereby ordered and decreed as follows:

1. The Court finds that all of the reports made by the Special Commissioner are confirmed in their entirety and the same are made a part of this Order as if written herein.

2. The Court finds that there are four separate and separate corporations as follows:

(a). Pocahontas Insurance and Trust Co..
(b) Pocahontas Insurance Co.
(c.) Insurance Corporation of America
(d) First Corp Insurance Group.

BEST AVAILABLE COPY

3. The Court finds that each of the four corporations as listed in 2 above have seventy-one separate and individual divisions, and these are shown on Exhibits A, B, C and D.

4. The Court finds that each corporation division can operate in all the states, territories and the District of Columbia under the original Charter as set out in Exhibit E.

5. The Court finds that each corporation and each division was authorized and approved to do business in each state, territory and the District of Columbia as set out in Exhibit F.

6. The Court finds that the divisions may be sold at any time the parent company desires and if and when this takes place, that division may become a separate and independent corporation in each state, and the same may be placed of record in all of the states, territories and the District of Columbia for a filing fee of $5.00.

7. The Court finds that the original deposits as set out heretofore in the Special Commissioners' report are to remain with the states and cannot be removed as a cash asset. Further, the Court finds that these funds are to serve as security for all the corporations and each division which shall share and share alike.

8. The Court finds that the following eight corporations are independent from any of the above four corporations and that the same may trade and act under the original Charter and they are as follows:

BOOK 353 PAGE 108

(a) World Insurance Co.
(b) West Virginia Life Insurance Co.
(c) United Pocahontas Insurance Co.
(d) American Insurance Co.
(e) West Virginia Multiline Insurance Co
(f) United American Insurance Co.
(g) American Insurance Group
(h) Pocahontas Insurance Group.

Entered this 8th day of December, 1911
(s) Ben Green
Substitute Judge

Admitted to record on January 8, 1912 at Charleston, West Virginia, at the office of the Ex-Officio Insurance Commissioner of the State of West Virginia.

I certify the attached is a copy of order recorded in Lee County Clerk's Officewhich was taken from photo copies presented to our officer and certified by Honorable James F. Davey, Clerk of the United States District Court of District of Columbia and recorded in this office in deed book 353 page 106.

Teste

Charles Calton, Clerk

No. 89-167

FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

INSURANCE CORPORATION OF AMERICA,

Petitioner,

v.

J.S. DARST, INSURANCE COMMISSIONER, STATE OF WEST VIRGINIA; STATE OF FLORIDA, TOM GALLAGHER, COMMISSIONER, DEPARTMENT OF INSURANCE AND TREASURER; STATE OF CONNECTICUT AND PETER F. KELLY, INSURANCE COMMISSIONER; ROBERT D. HAASE, COMMISSIONER OF INSURANCE, STATE OF WISCONSIN; AND WILLIAM D. HAGER, COMMISSIONER OF INSURANCE, STATE OF IOWA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether, in a hearing to determine the authenticity and genuineness of purported ancient court orders, the proponent's mere offer into evidence of copies of said orders certified by a clerk of a court other than the court which issued the orders, which were suspicious on their face, shifts the burden of proof of authenticity to the opponent of such issue.

2. Whether there is any substantial federal question presented by the manner in which the case was handled below relating to burden of proof, given the finding of fact of the District Court that the orders were not authentic.

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OTHER AUTHORITIES:

Fed. R. Evid. 902 ..... 5, 6, 7

1 Moore, *Federal Practice* ¶ 0.3(2) (2d ed. 1986) 2

5 *Weinstein's Evidence* ¶ 901(a)[01] (1988) 7

5 *Weinstein's Evidence* ¶ 902[01] (1983) 7

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STATEMENT OF THE CASE

Although the petitioner presents a lengthy Statement of the Case, the Court should be apprised of the following pertinent facts which do not appear in the petition.

This litigation resulted as a response to four independent state proceedings initiated by the insurance departments of the respondents against the petitioner. Each respondent sought to enforce its respective Unauthorized Insurers Act. The state actions claimed the petitioner was transacting the business of insurance without a license in the respective states. This fact is undisputed by petitioner. The petitioner defended by claiming it had the right to sell insurance without a license in all fifty states by virtue of a purported 1914 court order from the United States Circuit Court of Delaware sitting at Dover, Delaware.

Although purportedly issued by the Circuit Court of Delaware, the petitioner offered at trial copies of the orders certified by deputy clerks of the District Court for the District of Columbia. The orders bear neither a District of Columbia file stamp nor a District of Columbia docket number.

The 1914 order and a purported related 1911 order from the same court contained numerous facial anomalies. The anomalies which were not refuted at trial include:

1. Both orders are entered by the "United States Circuit Court of Delaware at Dover, Delaware." The circuit courts were abolished effective January 1, 1912. Act of March 3, 1911, ch. 13, 36 Stat. 1087 (Judicial Code of 1911). The practice in cases carried over from the circuit

court was to refer to the "district court" in the caption. App. at 250.[1] The Circuit Court of Delaware had not had its seat of business at Dover, Delaware since 1856. Act of June 14, 1856, ch. 45, 11 Stat. 22.

2. The orders are issued outside the court's jurisdiction, i.e., Beckley, West Virginia, P. App. at C-3;[2] the latter location never was within the boundaries of the Circuit or District Court of Delaware. Except for certain Interstate Commerce Commission cases, a federal court in one jurisdiction could not sit in another jurisdiction and lawfully issue orders. *See* 1 Moore, *Federal Practice* ¶ 0.3(2), at 23 n. 15 (2d ed. 1986).

3. The orders purport to bind persons – the Commissioners – who were not listed in the caption of the 1914 order and over whom there would have been no personal jurisdiction. The federal courts in 1914 had no power to issue process outside their own jurisdiction. *Id.*

4. The orders exhibit a conformed signature of a "substitute judge." The evidence indicated there is no federal office known as "substitute judge." App. at 183, 252; Defendants' Exhs. 7, 13, 14. Other circumstances, such as lack of an equity number, rules of court, and the ramifications of the orders, suggest a "master in chancery" would not have been involved. App. at 431-33.

---

[1] References to the Appendix filed in the Court of Appeals for the Third Circuit are designated as "App. ___."

[2] The Appendix to the petition is designated "P. App. at ___."

5. The orders bear no docket number and are handwritten. Dr. Robert Plowman, Chief Archivist of the Philadelphia branch of the National Archives and respondents' witness, testified there was a consecutive numbering system for equity cases for the period in question in Delaware and there was a case file for each docket number, thus refuting the possibility of unaccountable destruction of the Delaware court's records. App. at 253.

6. The orders have a far-reaching effect contrary to all contemporary or future law and policy. At the time the orders would have been entered, the authority of the states to regulate insurance was well established. *See Paul v. Virginia*, 75 U.S. 168 (1869). It was later reaffirmed by Congress in the McCarran Act, 15 U.S.C. § 1012.

Other than the proffered certified copies, there is no affirmative evidence of the orders. A thorough search of the court documents for the District and Circuit Courts of Delaware, which were in the possession of the National Archives branch in Philadelphia, utterly failed to locate them. App. at 245-246.

The Chief Clerk of the United States District Court for the District of Columbia concluded the certification of the copy of the 1914 order by his deputy was a mistake in view of the fact that, after checking, it was determined that the original was not in his office's possession and the document had no file-stamp or case number. App. at 667, 705. At most, the Clerk testified, a copy that was an exhibit in another case was certified. App. at 703.

The orders were purportedly signed by Ben Green. Respondents presented ample evidence from records custodians at the Justice Department and the National

Archives in Washington that there is no record of a Ben Green as an appointed judge prior to 1960 or as a commissioned officer of the United States. App. at 286. No evidence to the contrary was ever offered.

The petitioner misstates that the magistrate "refused during trial to admit the orders pursuant to Rule 902(4)." Pet. at 8. On the contrary, at the close of trial the orders were admitted and the magistrate stated:

> I think that because we have documents admitted for ID, aside from the primary documents at issue here, that I am going to change their technical status somewhat and admit them as Plaintiffs' 3 and 4 subject to the defendants' objections. I will resolve the authenticity and the admissibility after I have received your briefs.

App. at 324.

REASONS FOR DENIAL OF THE PETITION

1. The decision below does not conflict with any other federal or state court decision on the issue of the authenticity of the purported court orders involved in this litigation. In fact, there is consistency between the Third Circuit's decision and that of the Court of Appeals for the Ninth Circuit in *Insurance Corporation of America v. Hulett*, No. 87-6565, slip op. (Ninth Circuit, June 27, 1988). *See* R. App. at A-1.[3] The Ninth Circuit ruled that the identical documents "on their face are not authentic." R. App. at A-2. In an order dealing with the issue of

[3] The Appendix to this brief is referred to as "R. App. ___."

sanctioning ICA's counsel, on the Ninth Circuit's own motion, that court further stated "there are serious reasons to doubt [their] authenticity," R. App. at A-11, and, cited in detail several "badges of apparent falsification" on the face of the orders. R. App. at A-11 to A-12. Therefore, the granting of the petition would be unnecessary since any review of the Third Circuit's affirmance of the District Court's evidentiary rulings would not disturb the Ninth Circuit's independent decision on the merits, finding the alleged orders were not authentic.

2. The issue presented by this case is not of the calibre, importance and scope that warrants this Court's review. The issue of the authenticity of these two purported court orders is esoteric, based on its own peculiar facts, and of limited, if any, precedential value in that only the litigants would be interested in whether the orders are genuine. This point is demonstrated by the fact that neither the district court nor court of appeals decisions have been published.

3. The trial court was faced with the single factual issue of determining whether particular purported orders from a now defunct federal court were genuine and authentic. The threshold requisite to establish the existence of a court document through introduction of a certified copy thereof is that the original is genuine and was duly executed. *Winn v. Patterson*, 34 U.S. (9 Pet.) 663, 673 (1835). The District Court could properly have refused to admit the orders under Fed. R. Evid. 902, because the prerequisites for admissibility thereunder had not been met. While the threshold for admission under Rule 902 is not high, it is nevertheless not totally nonexistent. 5 *Weinstein's Evidence* ¶ 902(4)[01] (1983); *see*

also In re Japanese Electronic Products, 723 F.2d 238, 285 (3d Cir. 1983), *rev'd on other grounds*, 106 S.Ct. 1348 (1986). Implied in Rule 902 is the common law requirement that a proper certification be made. *See Mullican v. United States*, 252 F.2d 398, 402 (5th Cir. 1958). Such a certification would be one from the court which would have had possession of the original document – the United States District Court for the District of Delaware, or from its repository for historical documents, the appropriate branch of the National Archives. *Id.* It was settled early that the custodian of a document can only certify to copies required by law to be recorded or kept by him, or where some statute expressly made such copies evidence. *See e.g., New York Dry Dock v. Hicks*, 18 F. Cas. 151 (C.C.D. Mich. 1850). Absent the certification from the Delaware court or Philadelphia branch of the National Archives, there was never any foundation for admitting the orders.

The relevance of "admission" of the orders is, in any event, overstated by petitioner. The trial court did ultimately admit the orders. P. App. at B-18; and had admitted them for "identification" purposes during the trial. App. at 126. At the close of the trial the orders were admitted as full exhibits. App. at 324. Thus, there was no prejudice to petitioner from an evidentiary standpoint. The orders were "in" the record. Once that was accomplished, however, their authenticity was in issue. Petitioner would have admission of the orders determine the merits of the controversy but this clearly places the cart before the horse. As stated by Judge Weinstein:

> The central point is that whenever proffered evidence is challenged on grounds of authenticity or identity, it should be admitted once a

> prima facie case has been made on the issue. Such a finding of authenticity does not guarantee that the evidence will be considered by the trier of fact. *While it permits admission of the evidence it is . . . subject to the jury's ultimate determination as to its genuineness. The opposing party may introduce evidence disputing genuineness and argue the point to the jury. Once the evidence is admitted the question becomes one of credibility and probative force* and the trier may ultimately disbelieve the proponent's proof and entirely disregard or substantially discount the persuasive impact of the evidence admitted. The rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.

5 *Weinstein's Evidence* ¶ 901(a)[01] (1988) (emphasis added) (footnotes omitted).

The District Court correctly found that admission of the orders under Fed. R. Evid. 902 would not serve to shift the burden to respondents.

> Rule 902 deals only with admissibility. It provides for admission of certain documents. *Once admitted, the proponent on an issue has the normal burden of proof, unaided by a presumption*. Should authenticity become an issue, the court may explain the background of reliability. . . .

5 *Weinstein's Evidence* ¶ 902[01] at 902-8 (1983) (emphasis added).

The petitioner confuses the rules of evidence, which require some basic threshold of authenticity to justify admissibility of documentary evidence, and the proponent's burden of proving the genuineness of a document when it is duly put at issue in a case. A major defect in

petitioner's case is demonstrated on page 16 of the petition where it presents the propositions that "extrinsic evidence of authenticity is not a condition precedent to the admissibility of certified copies of public records" and that "this Court has recognized that a document offered by a public officer whose duty it is to keep the originals should be received in evidence." Petitioner then goes on to assert that the "Third Circuit's affirmance of the decision of the Magistrate is inherently inconsistent with these authorities." Although the above quoted propositions are sound, they are not at issue or applicable in this case. The fact is that the magistrate did admit the contested orders into evidence in this case so the first quoted proposition is not at issue. App. at 324; P. App. at B-14 to B-15. Moreover, the second quoted proposition is totally inappropriate because the fact is that the certified copies relied on do not come from "a public officer whose duty it is to keep the originals." Petitioner offered no evidence whatsoever that the District Court for the District of Columbia is the proper repository for original documents originating from the "United States Circuit Court of Delaware at Dover, Delaware." Respondents' witness, on the other hand, testified that the Philadelphia branch of the National Archives holds all Delaware court files for the period in question. App. at 233.

As the facts were found by the magistrate, the orders possessed many suspicious and unusual characteristics; the validity of the certification process was questionable. Under these circumstances it would have been a travesty of justice to place the burden of proof on the merits of the authenticity issue on respondents. The Court should

leave the fact findings of the magistrate, as affirmed by the Third Circuit, undisturbed.

4. At the scheduling conference, both parties were admonished by the presiding district court judge to treat the burden of persuasion on the issue of authenticity as though it were on them. App. at 40. At trial on the authenticity issue. petitioner proceeded first, i.e., it had the burden of going forward, which normally implies the burden of proof. Thus, it had every reason to believe the burden of proof was on it. This was especially so in light of the inherently questionable and unusual nature of the orders.

The trial court's ultimate finding that petitioner failed to meet its burden of proof was not a retroactive assignment of the burden of proof but simply a statement that petitioner had failed to prevail on the merits and that the orders were in fact not authentic. Petitioner was hardly prejudiced by having to put its evidence on in its case-in-chief instead of in its rebuttal case. The timing of the receipt of evidence did not, in other words, create error of constitutional dimension. The order in which petitioner introduced its "extrinsic" evidence into the record was ultimately irrelevant.

Nor was there any property right in the orders to which due process could attach. Property rights are a creation of state law. *See Bishop v. Wood*, 426 U.S. 341, 345 (1976). The orders, purportedly issued by a *federal* court, cannot purport to create an entitlement under *state* law to an exemption from *state* insurance law.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JSL Central California ORDER (Filed June 27, 1988)

Appeal from United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted: May 27, 1988
Motions Panel

Before: HUG, BRUNETTI and NOONAN, Circuit Judges

Insurance Corporation of America ("ICA") appeals an order by the United States District Court for the Central District of California denying ICA's request for a temporary restraining order and preliminary injunction against defendants suspending the operating authority of certain limousine operators. These operators are threatened with suspension because they are insured by ICA which has failed to comply with the state regulation of insurance companies. ICA alleges that the district court's

denial of its motion does not give full faith and credit to two court orders, dated 1911 and 1914 respectively, which precluded state regulation of ICA.

The bases of ICA's suit are two decrees attached to its complaint. The first is dated December 8, 1911 and is headed, "In the United States Circuit Court of Delaware at Dover, Delaware." It is signed by "Ben Green, Substitute Judge." The second decree, dated February 26, 1914, is similarly captioned and similarly signed. These decrees purport to establish that certain insurance companies are free from any state or federal regulations.

The decrees on their face are not authentic. There was no such court as the "United States Circuit Court of Delaware." There was no such office as "Substitute Judge." There was not, in the period 1911-1914, any federal judge known as "Ben Green." See *Judges of the United States* (2 ed.).

Even it the orders were authentic, they would not preclude regulation today by the State of California. The McCarran-Ferguson Act enacted in 1944 provided that:

> The business of insurance and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business. 15 U.S.C.A. § 1012(a).

If ICA was "grandfathered" under legislation in effect in 1914, it was not so exempt under this Act of 1944. The orders refer to ICA as a "grandfathered" corporation without citing any authority for this status. That a court in 1914 might have determined that an insurance company was "grandfathered" under statutes in effect at the

time, has no bearing on whether the company is subject to regulation under statutes in effect today. ICA has offered no proof that the modern statutory scheme exempts it from regulation.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JLS Central California ORDER (Filed Oct. 18, 1988)
In re: ALLAN J. BESBRIS and JANET L. RUBIN, Respondents.	

Before: HUG, BRUNETTI and NOONAN, Circuit Judges

Appellant's petition for rehearing is hereby DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JLS Central California ORDER (Filed Oct. 18, 1988)
In re: ALLAN J. BESBRIS and JANET L. RUBIN, Respondents.	

Appeal from United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted: May 27, 1988

Before: HUG, BRUNETTI and NOONAN, Circuit Judges

Insurance Corporation of America (ICA) brought suit seeking to bar the California Department of Insurance (the Department) from regulating ICA or suspending the operating authority of its policy holders. ICA based its request on two decrees purportedly issued by a federal

court. These decrees excited the suspicion of the Department and their authenticity was contested in the district court. Without making a finding on their authenticity the district court gave judgment for the Department. On appeal this court affirmed and issued a show cause order to the attorneys for ICA, Allan J. Besbris and Janet L. Rubin, requiring that they show cause why they had reason to believe that the two decrees were authentic and, failing to do so, why the attorneys should not be subject to discipline by this court.

The first of these decrees was in a case entitled *Pocahontas Insurance and Trust Company, Plaintiff v. Pocahontas Insurance Company, Defendant; Pocahontas Insurance Company, Plaintiff v. Insurance Corporation of America and First Corporation Insurance Group.* The order is designated as "Final Order of Clarification." It is dated December 8, 1911. It purports to issue from United State Circuit Court of Delaware at Dover, Delaware. At the conclusion of the decree there appears:

(s) Ben Green
Substitute Judge

The decree finds that there are four separate corporations – the ones mentioned in the caption of the case – and that they have 71 separate divisions as shown on exhibits that are not attached to the decree. The court further finds that each of these 71 divisions "can operate in all the states, territories and the District of Columbia under the original Charter" and that each of them has been "authorized and approved to do business" in these jurisdictions; further that the parent company may sell

each of these divisions and each may become "a separate and independent corporation in each state."

The decree carries the further notation that it was recorded "on January 8, 1912 at Charleston, West Virginia at the office of the Ex-Officio Insurance Commissioner of the State of West Virginia." A seal of the United States District court for the District of Columbia is stamped on the final page of the decree and with the seal is a certification:

A TRUE COPY
JAMES E. DAVEY, CLERK

By K.M. Keyes
Deputy Clerk

The second decree has a different caption. It purports to be the case of *Pocahontas Insurance and Trust Co., & Pocahontas Insurance Co., & Insurance Corporation of America, & Firstcorp Insurance Group v. J.D. Darst, Insurance Commissioner State of West Virginia, et al.* It is entitled "Final Order." It is dated February 5, 1914. The first page announces that the decree is in the United States Circuit Court of Delaware at Dover, Delaware. The final page reads as follows:

> Entered this 5th day of February, 1914 at
> Beckley, West Virginia by the Panel
>
> /s/ Ben Green
> Substitute Judge

Like the 1911 decree it purports to be admitted to record in the Ex Officio Insurance Commissioner's Office of West Virginia and it is certified in the same way by the United States District Court Clerk for the District of

Columbia. The court seal is not visible on this copy. The additional information is supplied that copies were "written and mailed to all state and [sic] etc. this day."

The decree refers to "a Final Order of Clarification" "entered on December 8, 1911 by this court" in which there are "findings which are still in effect, and which shall remain in effect so long as these corporations and their divisions shall desire to operate in all States and Territories of the District of Columbia." The decree continues:

> And now, the matter dealing with the "Insurance Commissioners" and the right to regulate these four Plaintiffs and each one's seventy-one divisions and the eight other corporations. The court finds that the Four Plaintiffs and their seventy-one divisions and the eight other corporations are "Grandfathered" Insurance Corporations and are not in any way subject to regulation by any Insurance Department, Commissioner, or any other official of any State, Territory or by the District of Columbia.
>
> This Final Order shall apply to all insurance Departments in all States and Territories and the District of Columbia Defendants to this case. Service of process has been acknowledged by either the Governor of each State, Territory and the District of Columbia, or its agent, and the same is of record in this case.
>
> Therefore, it is Ordered that the four Plaintiffs and each one's seventy-one divisions shall be free from any regulations by any Local, State (Insurance Departments and/or Commissioner or the State Administrator's Office) or by the Federal regulations what-so-ever. Further, the

> deposits shall not be removed, but shall appreciate and Compound yearly to support each Plaintiff, the eight independent Insurance Corporations and the seventy-one divisions of each of the plaintiffs.

In response to the order to show cause, Besbris and Rubin have noted that the two decrees were certified by two deputy clerks of the United States District Court for the District of Columbia; that the chief clerk of this court and the two deputy clerks who had certified the orders believed that they were authentic; that the president and "the Forwarding Counsel" for ICA both confirmed that they believed the orders were authentic; and that counsel had consulted with Professor Erwin C. Surrency.

In an affidavit in this case Professor Surrency states that he is professor of law and director of the law library at the School of Law of the University of Georgia; that he had previously been on the law faculty of Temple University School of Law; that he has published a substantial number of articles relating to the history of the federal courts; and that he is the author of a book entitled *History of the Federal Courts* (1987). He further declares that based on his research he knows there was a United States Circuit Court for the District of Delaware in existence until January 1, 1912 and therefore "according to statutory provisions, continued to hear cases for some time concerning those cases entered on the docket of the circuit court." He further states that prior to the 1920s federal courts generally followed the customs of the state in which the court sat and it was not unusual for judges to hear cases at locations other than those designated by statute and that "it would not have been unusual for a 'Substitute Judge' to preside in the place and stead of an

Article III judge in a location not specifically provided for by any Judiciary Act." Professor Surrency further states that he has reviewed the two orders and based upon his knowledge acquired through 30 years of research it is his "opinion that these Orders which are the subject matter of the proceedings . . . are authentic."

ANALYSIS

Federal Rule of Civil Procedure 11 mandates disciplinary sanctions for misrepresentations by an attorney. The rule requires the attorney to certify that filed documents are well grounded in fact, to the "best of the signer's knowledge, information, and belief formed after reasonable inquiry." Fed. R. Civ. P. 11; *see In Re Boucher*, 837 F.2d 869, 871 (9th Cir. 1988). The test for determining whether an attorney has violated Rule 11 is whether the attorney has conducted a *"reasonable inquiry* into whether his paper is frivolous, legally unreasonable, or without factual foundation." *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 557 (9th Cir. 1986) (emphasis in original). If Besbris and Rubin have misrepresented the authenticity of the decrees to the court, they are subject to discipline if they failed to conduct a reasonable inquiry on the subject.

The relevance as well as the authenticity of the first decree is doubtful. This court is at a loss to understand how a case that in 1911 was a case between various divisions of the Pocahontas Insurance and Trust Co. became in the second decree a case in which the original plaintiffs and defendants are all aligned as plaintiffs against the Insurance Commissioner of West Virginia "et

al." On the face of it there is no coherence between the two decrees.

As to the second decree – the only decree of relevance – there are serious reasons to doubt its authenticity:

1. It purports to bind the insurance departments of all states, territories and the District of Columbia. The decree recites that process has been acknowledged by the governor "of each State, Territory and the District of Columbia, or its agent." But the federal courts in 1914 had no power to issue process outside their own jurisdictions without specific congressional authorization. 1 J. Moore, Moore's Federal Practice ¶0.3[2] at 23 & n.15 (citing *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 329 (1838) ("[B]y the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts [and] independently of positive legislation, the process can only be served upon persons within the same district.")) The recital of service of process in the decree is, therefore, a badge of apparent falsification.

2. The decree purports to be issued "at Beckley, West Virginia by the Panel." Even making allowance for the adoption of state customs as stated by Professor Surrency, there is no evidence whatsoever that a federal court in one jurisdiction would sit in another jurisdiction and issue orders. *See* 1 J. Moore, *supra; Toland*, 37 U.S. at 328 ("[T]he circuit court of each district sits in and for that district; and is bounded by its local limits.") On its face the statement that the decree was issued at Beckley, West Virginia contradicts the statement that it was issued

in the United States Circuit Court of Delaware. The contradiction is a badge of apparent falsification.

3. The decree explicitly and extravagantly finds that the insurance companies in question "are 'Grandfathered' Insurance Corporations and are not in any way subject to regulation" by a state. The use of the word "grandfather" as a verb, or an adjective derived from a verb, is an anachronism. Lexicographers place the first such use of the word "grandfather" no earlier than 1968. C. Barnhart, S. Steinmetz & R. Barnhart, The Second Barnhart Dictionary of New English 224 (1980). A Lexis search of "older federal cases," including Supreme Court cases 1790-1924, appellate court cases 1938-1969, and district court cases 1948-1969, does not disclose a single use of the word "grandfathered." The use of "grandfathered" is a badge of apparent falsification.

4. The defendants have offered evidence to this court that no public record exists of these decrees or the cases in which they were purportedly entered.

Out of an abundance of caution we wish to give Besbris and Rubin the opportunity to be heard in person and to show that, despite the strong indicia of fabrication, they had reason to submit the decrees as relevant and genuine. The court therefore remands this case to the district court for an evidentiary hearing. The district court should determine whether or not the decrees are authentic, and whether the inquiry conducted by ICA's attorneys satisfied the requirements of Rule 11. In particular, the district court should examine the date and circumstances of Besbris and Rubin's consultation with Professor Surrency. The defendants should be invited to

participate in the hearing and to present any further evidence they may have to offer on the authenticity of the decrees and the inquiries made by Besbris and Rubin. After the district court has held the evidentiary hearing and entered its findings into the record, this court will rule on the order to show cause issued to ICA's attorneys.

IT IS SO ORDERED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JLS Central California ORDER (Filed Dec. 1, 1988)
In re: ALLAN J. BESBRIS and JANET L. RUBIN, Respondents.	

Before: HUG, BRUNETTI, and NOONAN, Circuit Judges.

On October 18, 1988, the petition for rehearing was denied. That is the final action of this court on the merits of the appeal. The appellant's time for filing a petition for a writ of certiorari runs from that date.

The order pertaining to factual findings concerning possible Rule 11 sanctions has no bearing on the finality of the order on the merits of the appeal. The motion for clarification is denied.

No. 89-167

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

INSURANCE COMPANY OF AMERICA, et al.,
Petitioner,

v.

J.S. DARST, INSURANCE COMMISSIONER, STATE OF WEST VIRGINIA, STATE OF FLORIDA, WILLIAM GUNTER, COMMISSIONER, DEPARTMENT OF INSURANCE AND TREASURER; STATE OF CONNECTICUT AND PETER W. GILLIES, INSURANCE COMMISSIONER; ROBERT D. HAASE, COMMISSIONER OF INSURANCE STATE OF WISCONSIN; AND WILLIAM D. HAGER, COMMISSIONER OF INSURANCE, STATE OF IOWA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were Petitioner Insurance Corporation of America and respondents (collectively the "Respondents") the State of Florida, William Gunter, Commissioner, Department of Insurance and Treasurer; State of Connecticut and Peter F. Kelly, Insurance Commissioner; Robert D. Haase, Commissioner of Insurance, State of Wisconsin; and William D. Hager, Commissioner of Insurance, State of Iowa.

In addition, the following parties did not enter appearances but were listed as plaintiffs in the underlying proceedings because of their position as plaintiffs in the original proceedings giving rise to the orders that are the subject of this dispute: Pocahontas Insurance & Trust Co.; Pocahontas Insurance Co.; Firstcorp Insurance Group. Similarly, respondent J. S. Darst has not entered an appearance, and was listed as defendant in the underlying proceedings solely because he was named as the primary defendant in the proceedings from which the orders in dispute originated. The parent corporation of Insurance Corporation of America is Principle Holding Corporation, a Delaware corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

INSURANCE CORPORATION OF AMERICA,
Petitioner,

v.

J. S. DARST, INSURANCE COMMISSIONER,
STATE OF WEST VIRGINIA, et al.,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The fundamental issue presented by this petition is whether properly certified copies of final court orders and judgments bear a presumption of authenticity which, upon introduction of such documents into evidence, shifts the burden to the party opposing enforcement to introduce evidence rebutting the presumption. In their Brief in Opposition, the Respondents fail to directly address this issue, or to respond to Petitioner's argument that the Magistrate's ruling completely undermines the integrity of court orders generally.

STATEMENT OF THE CASE

In their "Statement of the Case", Respondents direct the Court's attention to a list of "pertinent facts", which, they imply, are "undisputed". Respondents go so far as to claim that these "facts" were "not refuted at trial". Respondents' "undisputed facts" are, however, nothing more than arguments that Respondents posit as a basis for denial of the Petition. To represent that these so-called "facts" are "undisputed" is grossly misleading. Petitioner has throughout the pendency of this matter refuted Respondents' claims. Had the burden of proof been properly assigned at trial, Petitioner would have offered evidence in direct response to these claims. As it happened, however, much of Petitioner's evidence was excluded by the Magistrate as improper rebuttal evidence – evidence more properly introduced in Petitioner's case in chief. *See, e.g.*, App. at 318-322; Petition for Writ of Certiorari, at 8-9. The exclusion of this evidence was the direct result of the Magistrate's erroneous rulings on the burden of proof.

The remainder of this reply will address new arguments set forth in the Respondents' Brief in Opposition, including those reasons or arguments advanced in Respondents' Statement of the Case.

RESPONDENTS' "REASONS FOR DENIAL OF THE PETITION" ARE WITHOUT MERIT

At Page 1 of their Brief in Opposition, Respondents make much of the fact that the Orders as offered at trial bore neither a file stamp, nor a docket number from the Federal District Court for the District of Columbia, or from the Delaware District Court. On the issue before this Court, however, such contentions are of no significance.

Respondents' assertions simply do not address the issues presented by the Petition. The essential question presented for review is not, at this stage, the actual

authenticity or enforceability of the Orders themselves. Rather, the question is which party should bear the burden of introducing, in the *first* instance, evidence extrinsic to the Orders that refutes – or confirms – their authenticity. Fundamental to this issue is the compelling societal interest in the integrity, certainty and finality of judgments and orders. Respondents' reliance upon the absence of docket numbers and such other issues in no way diminishes the importance of these questions.

Respondents next take up the question of the so-called "anomalies" in the two Orders, and state simply that they were not refuted at trial. Again, Respondents have not addressed the basic issue before this Court. Rather, Respondents are presumably suggesting that if "anomalies" exist and are unrefuted, that somehow this answers the question of the shifting of the burden of proof. Indeed, at trial Respondents offered nothing but their own arguments to support their conclusion that the "anomalies", in and of themselves are sufficient to demonstrate a lack of authenticity. Although precluded from offering certain of its evidence by the Magistrate's improper allocation of the burden, Petitioner's expert witness, Professor Surrency, unequivocally testified that the Orders are authentic. This direct, expert conclusion remains, to date, unrebutted by the Respondents.

Respondents have done one other thing which Petitioner suggests is flagrantly misleading, and, in any event, irrelevant. They have included in their Brief in Opposition, references to Orders and opinions rendered by the United States Court of Appeals for the Ninth Circuit, arising in the context of a motion for injunctive relief, and a motion for disciplinary sanctions. If the California decisions were relevant at all to the issues before this Court, then Respondents might have been heard to argue collateral estoppel. No such argument has ever been made by Respondents.

Rather, Respondents' ploy is to place before the Court statements that are in essence dicta, issued in cases where the question of authenticity was not squarely presented. There was no "decision on the merits" in the Ninth Circuit, as apparently claimed by the Respondents. As the Respondents well know, no evidence was presented in the California Courts on the question of the authenticity of the documents, and, in fact, there was not even any discovery conducted. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461 (1982). As a consequence, the question of the burden of proof, which is before this Court, was never considered by the California Courts. One can only conjecture that Respondents at this late date are citing the California matters in a last ditch effort to unfairly prejudice the Petitioner before this Court.

CONCLUSION

Petitioner seeks the issuance of a Writ of Certiorari based upon serious and wrongful interpretations of law by the trial court. Defendants in response have chosen to rely on irrelevant matters rather than address the basic issues raised by Petitioner. Petitioner, having demonstrated the validity of its position with respect to the basic issues before this Court, it follows that the Court should grant the Writ sought.

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September 18, 1989

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1989, three copies of the foregoing Petitioner's Reply to Respondents' Brief in Opposition to Petition were mailed, first class postage paid, to the following:

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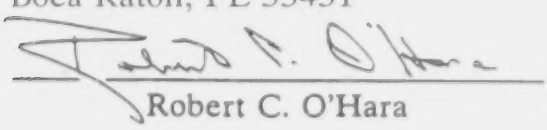
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